

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Bell Telephone Company,	:	
	:	
Complainant,	:	
	:	
v.	:	Docket No. 01-0078
	:	
Commonwealth Edison Company,	:	
	:	
Respondent.	:	
	:	
Complaint regarding wrongful refusal to	:	
Provide customer-specific customer transition	:	
Charges.	:	

**EXCEPTIONS AND BRIEF ON EXCEPTIONS
OF ILLINOIS BELL TELEPHONE COMPANY**

Illinois Bell Telephone Company (“SBC Illinois”) submits the following exceptions and brief on exceptions regarding the Administrative Law Judge’s Proposed Order (“PO”) in this proceeding.

The Proposed Order correctly concludes that the Electric Service Contract between SBC Illinois and Commonwealth Edison Company (“ComEd”) is a “customer-specific electric service contract,” as that term is used in ComEd’s Rate CTC. It also correctly determines that, because SBC Illinois had a customer-specific contract, it was entitled to receive from ComEd customer-specific Customer Transition Charges (“CTC”) for all facilities covered by the Contract.

The Proposed Order erroneously concludes, however, that SBC Illinois could make no use of these customer-specific CTCs. In particular, the Proposed Order incorrectly decides that the Contract precluded SBC Illinois from taking advantage of customer-specific CTCs while the Contract was in effect and that it is not entitled to reparations. In addition, the Proposed Order inappropriately determines that, because the Contract expired at the end of 2002, mootness bars the requests by SBC Illinois that ComEd provide such CTCs and that ComEd use such CTCs in billing SBC Illinois.¹ As a result, the Proposed Order reaches a conclusion that the ALJ himself terms “ironic,” finding that ComEd violated the law, but providing no relief whatsoever to SBC Illinois.

EXCEPTION 1:

THE PROPOSED ORDER IMPROPERLY CONCLUDES THAT THE CONTRACT WAS INCOMPATIBLE WITH UNBUNDLED SERVICES.

The Proposed Order determines that SBC Illinois was entitled to customer-specific CTCs for facilities governed by the Contract. However, it also finds that SBC Illinois could not make use of such CTCs because the Contract compelled it to continue to take service from ComEd on a bundled basis. See PO at 10. As a result, the Proposed Order concludes that, under the Contract, SBC Illinois could not even have made use of class CTCs. See id. at 12. These findings are incorrect.

¹ By way of clarification, SBC Illinois also would point out two apparent typographical errors in the Proposed Order: 1) in the last line of page 2, the word “residential” should be “nonresidential;” and 2) in the second line of the “Conclusions” section on page 13, the word “CSCs” should be “CTCs.”

A. ComEd Has Admitted that the Contract Permitted SBC Illinois to Purchase Delivery Services, While Continuing to Operate Under the Contract.

One of the primary rules of contract construction is that a contract should be interpreted consistent with the construction placed on it by the parties prior to the time a dispute arose. “Where the parties have adopted a particular construction of doubtful terms or conditions of a contract, the court will follow the construction which the parties placed upon it.” Farmers State Bank v. Schulte, 241 Ill. App. 3d 90, 94 (5th Dist. 1993). Such a construction may be proven through contemporaneous writings by the parties, which demonstrate the parties’ understanding of the contract’s meaning. See, e.g., Schulte, 241 Ill. App. 3d at 94 (documents related to loan used to construe promissory note); Lima Lake Drainage Dist. v. Hunt Drainage Dist., 204 Ill. App. 3d 521, 525-26 (3rd Dist. 1990) (engineering plans used to construe contract); Reed v. Holder, 200 Ill. App. 3d 1052, 1055-57 (contemporaneous letter supported trial court’s construction of contract); Vole, Inc. v. Georgacopoulos, 181 Ill. App. 3d 1012, 1021 (2nd Dist. 1989) (party’s letter used to construe contract). The Proposed Order fails to adopt such a construction.

On November 1, 1999, SBC Illinois requested that ComEd provide custom CTC calculations for each of the facilities under the Contract. On November 3, 1999, ComEd responded. Contrary to the position that ComEd has taken (albeit inconsistently) since this Complaint was filed, and contrary to the findings of the Proposed Order, ComEd did not contend at that time that the terms of the Contract were somehow inconsistent with SBC Illinois’ ability to take service under unbundled rates. Instead, ComEd stated that

SBC Illinois was entitled to unbundled rates, but only based on a class CTC. ComEd explained, in considerable detail, that this was so because, in ComEd's view, the Contract was not a customer-specific contract. ComEd's response reads, in relevant part, as follows:

This electric service contract does not contain charges for electric service specific to the Ameritech locations served under the contract. Rather, this contract makes Rider 32 – Curtailable Service Cooperative, available to locations served under Rate 6 and allows for a single point of notification for Rider 32 curtailment information. The charges for electric service paid by all locations served under the contract are not customer-specific. Rather, the electric service charges are the same as those paid by any customer electing the same electric service rates. Thus, customer-specific CTCs for customers with Customer-specific Electric Service Contracts, referred to on Original Sheet No. 137 of Rate CTC – Customer Transition Charge, are not appropriate for these Ameritech locations. Customer-specific CTCs are appropriate only for those individual Ameritech locations which have electrical demands (average of six highest in the three-year period ending June 30, 1999) equal to or greater than 3,000 kilowatts. Consequently, except for those Ameritech accounts that qualify for customer-specific CTCs by virtue of meeting the 3,000 kW criterion, the appropriate customer-class CTC will apply to each Ameritech account served under the contract referenced above.

Jt. Ex. 5 (emphasis added).

Nowhere does ComEd's letter say that SBC Illinois' request was being rejected because the Contract prevented it from becoming a delivery services customer, that SBC Illinois could not make use of any CTC while the Contract was in force, that the Contract would need to be terminated prior to making unbundled rates available to SBC Illinois, or that the Contract was in any other way inconsistent with SBC Illinois taking service under unbundled rates. To the contrary, ComEd said that "the appropriate customer-class specific CTC will apply to each Ameritech account served under the contract." Id. (emphasis added). This statement clearly reflects ComEd's contemporaneous understanding that bundled rates were among the "other applicable rates, riders or tariffs" (Jt. Ex. 1, § 1.3(a)) under which the Contract permitted SBC Illinois to take service. The

Proposed Order’s finding that the Contract did not permit SBC Illinois to take advantage of either a customer-specific or a class CTC calculation is thus entirely inconsistent with ComEd’s (and SBC Illinois’) understanding of the Contract.

Since this Complaint was filed, ComEd has struggled, generally without success, to distance itself from its original position. ComEd’s Answer does not consistently indicate that the terms of Contract were incompatible with SBC Illinois becoming a delivery services customer. Instead, several of the allegations in the Answer appear to indicate that unbundled rates were available under the Contract. For example, ComEd avers that “the Ameritech Illinois facilities covered by the Contract were granted eligibility to receive delivery services.” ComEd Answer, p. 14. In its First Affirmative Defense, ComEd alleges that the “Ameritech Illinois facilities covered by the Contract did not, . . . become ComEd delivery services customers . . . with the exception of one facility.” *Id.*, p. 27. Both statements suggest that facilities covered by the Contract could, at least potentially, become delivery services customers, and neither statement indicates that the Contract would need to be terminated before SBC Illinois could become a delivery services customer – although such an allegation does appear in other parts of the Answer. *See id.*, p. 29.

In addition, ComEd’s post-hearing response brief states that the “central question presented by this case is the type of customer transition charge (“CTC”) that Ameritech would be required to pay ComEd . . . if it were to begin taking delivery services” at locations served under the Contract. ComEd Resp. at 1-2 (emphasis added). Once again, ComEd’s argument is not that the Contract prohibited SBC Illinois from becoming a

delivery services customer at all, but simply that the Contract precluded it from getting a customer-specific, as opposed to a class, CTC calculation.

In short, ComEd's understanding of the Contract prior to this dispute was not that the Contract was inconsistent with unbundled rates. Instead ComEd's understanding was that, because ComEd did not view the Contract as being customer-specific, SBC Illinois could take unbundled service, but only based on a class CTC. That understanding, in fact, was the sole basis of ComEd's refusal to provide customer-specific CTC calculations to SBC Illinois. See Jt. Ex. 5. ComEd's subsequent argument, that the Contract is incompatible with unbundled rates regardless of the nature of the CTC calculation, is simply a litigation position which ComEd adopted after this Complaint had been filed. ComEd's previous interpretation of the Contract, not its subsequent litigation position, should govern the Commission's construction of the Contract. See, e.g., Schulte, 241 Ill. App. 3d at 94; Lima Lake Drainage Dist., 204 Ill. App. 3d at 525-26; Reed, 200 Ill. App. 3d at 1055-57; Vole, 181 Ill. App. 3d at 1021.

B. The Plain Language of the Contract Indicates that SBC Illinois Could Take Service on an Unbundled Basis.

The Proposed Order concludes that SBC Illinois could not make use of the customer-specific CTCs to which the Contract entitled it because the Contract did not permit it to take unbundled service at a Contract location. It reaches this conclusion by narrowly interpreting the phrase "other applicable rates, riders, or tariffs," as used in § 1.3(a) of the Contract, to mean that such tariffs must be "consistent" with Rates 6 and 6L and Rider 32, and by finding that any tariff providing for unbundled service is inherently inconsistent with Rates 6 and 6L and Rider 32. This conclusion, however, ignores the

plain meaning of the language used in § 1.3(a) and is based on a series of unwarranted speculations.

As SBC Illinois argued in its post-trial briefs, the Contract obligated it to take service from ComEd pursuant to the Contract itself, Rates 6 and 6L, various specified riders, and “any other applicable rates, riders or tariffs, . . . on file with the Illinois Commerce Commission.” Jt. Ex. 1, § 1.3(a). The tariffs establishing unbundled services are among the many other ComEd rates and tariffs to which § 1.3(a)(vi) refers. See SBC Illinois Br. at 29-30; SBC Illinois Reply Br. at 24-25.

The Proposed Order takes a more narrow view, however. It grants precedence to Rates 6 and 6L – and finds that only tariffs consistent with those rates are “applicable” under the Contract² – for two reasons. Those two rates “existed when the Contract was created” and “are essential to the purposes of the Contract.” PO at 11. Such a restrictive approach is belied by the expansive language used in § 1.3(a) and involves inappropriate assumptions about the parties’ intent.

It is true that the amendments to the Public Utilities Act allowing unbundled services did not become effective until five months after the Contract was signed. However, that fact does not lead to the conclusions adopted in the Proposed Order, for several reasons.

First, when the Contract was executed on July 8, 1997, ComEd was undoubtedly aware that delivery services were on the horizon. Illinois House Bill 0362, which was

² The Proposed Order’s assertion that “applicable” is a synonym for “consistent” seems dubious in light of the definitions of those words. A standard dictionary defines “applicable” as meaning “capable of or suitable for being applied.” Merriam-Webster’s Collegiate Dictionary 56 (10th ed. 1993). In contrast, “consistent” is defined as “compatible” or “showing steady conformity to character, profession, belief, or custom.” Id. at 247. A tariff providing for unbundled service is certainly “capable of being applied” alongside Rate 6, as demonstrated by the Curtailment Experiment set forth in ComEd’s Cross Ex. 8, which allowed customers to receive service both under Rate 6 and the unbundled service tariffs, Rate RCDS and Rider PPO.

eventually enacted as the Electric Service Customer Choice and Rate Relief Law, had its first reading in the Illinois General Assembly in January 1997. See 2 Legislative Reference Bureau, Final Legislative Synopsis and Digest of the 1997 Session of the 90th General Assembly, State of Illinois 972 (n.d.). The Proposed Order’s assumption that delivery services were unforeseen by the parties when they entered into the Contract in July 1997 (see PO at 10) is entirely unwarranted.

Second, such an assumption is directly contrary to the language of § 1.3(a)(vi) of the Contract. That section plainly states that the rates or tariffs “applicable” to the Contract include any of ComEd’s tariffs, as “added, deleted, modified or amended from time to time,” throughout the term of the Contract. Jt. Ex. 1, § 1.3(a)(vi). The provision makes no attempt to limit the “any other applicable” language to tariffs then in existence, and in fact it says just the opposite. That language confirms that Rates 6 and 6L are not entitled to precedence simply because they existed when the Contract was executed.

The Proposed Order also makes improper assumptions in determining what was “essential” to the purposes of the Contract. Courts can look to the “recitals” portion of a contract if necessary to determine the intentions of the parties. See Guhl v. Guhl, 376 Ill. 100, 110 (1941). The “Recitals” section of the Contract simply states that ComEd will provide electric service to SBC Illinois and that SBC Illinois will receive credits for curtailing its electric load at ComEd’s request. See Jt. Ex. 1, p. 1. The section makes no reference to Rates 6 and 6L, or any other ComEd rate. The Proposed Order’s conclusion that those rates are somehow “essential” to the Contract is thus is unfounded and inconsistent with the language of the Contract itself.

Similarly, the Proposed Order effectively assumes that the Contract contains an explicit requirement that SBC Illinois take service from ComEd only on a bundled basis. See PO at 12 (“The Contract requires IBT to take bundled services at Contract locations”). In fact, the Contract contains no such requirement. Instead, it obligates SBC Illinois to take from ComEd all its electricity needs for the facilities covered under the Contract (Jt. Ex. 1, § 1.1(a)) and it prohibits SBC Illinois from receiving service for the covered facilities “through the use of alternative energy supply, including . . . purchase or manufacture of electricity from sources other than” ComEd. Id., § 1.1(d). These provisions do not add up to a prohibition on taking electric service from ComEd in anything other than a bundled form.³

The Proposed Order thus effectively replaces the condition to which the parties agreed (that SBC Illinois purchase power and energy from ComEd) with a far more restrictive condition that appears nowhere in the Contract (that SBC Illinois not only purchase power and energy from ComEd, but also do so only under bundled rates). The Commission should not rewrite the Contract to suit ComEd, especially where ComEd could have easily inserted an explicit bundled rate requirement into the agreement. See Klemp v. Hergott Group, Inc., 267 Ill. App. 3d 574, 581 (1st Dist. 1994); cf. Floor v. Schaffhausen Corp., 49 Ill. App. 2d 97, 100 (3rd Dist. 1964) (stating that contracting parties’ intention should “not be determined from any surmises that they intended certain conditions that they failed to express”).

³ In fact, if the Contract were understood to require service only under bundled rates (a limitation that does not appear anywhere in the language of the Contract), the language requiring SBC Illinois to purchase its power and energy from ComEd would be meaningless surplusage—since bundled service, by definition, would mean that SBC Illinois would be purchasing power and energy from ComEd. A contract should be interpreted to give meaning to each provision. See Dolezal v. Plastic and Reconstructive Surgery, S.C., 266 Ill. App. 3d 1070, 1081 (1st Dist. 1994).

The Proposed Order’s assumption that the Contract revolves around bundled services also leads to speculative assumptions about the content of other ComEd tariffs that are not in the record. Most of the SBC Illinois facilities included in the original list of facilities attached to the Contract (see Jt. Ex. 1, Ex. A) were served under Rate 6T – a rate not explicitly listed in § 1.3(a). Although Rate 6T is not in evidence here, the Proposed Order states that Rate 6T “apparently is a bundled service tariff” (PO at 11 n.15) and thus can be added to “the enumerated *bundled* services” that SBC Illinois must use under § 1.3(a). Id. (emphasis in original). This passage thus assumes that other rates and tariffs explicitly listed in § 1.3(a) – such as Riders 16, 20, 23, 25, 28 and 31 – all must be tariffs for bundled services, even though none of those tariffs is part of the record here.⁴ It is inappropriate for the Commission to base its decision on materials that are outside the record and it should not consider such materials here. See Smith v. Department of Registration & Education, 412 Ill.2d 322, 348 (1952) (stating that administrative order must be based on evidence presented at hearing).

The Proposed Order accordingly should be revised to find that the Contract allowed SBC Illinois to receive unbundled electric service and thus that ComEd was obligated to calculate the customer-specific CTCs applicable to the facilities covered by the Contract. The Commission should incorporate in its order the replacement language regarding this issue set forth in Attachment 1 to this brief.

However, even if the Proposed Order’s construction of the Contract is correct (which it is not), it fails to recognize that the Contract would entitle SBC Illinois to custom CTC calculations for all facilities served under the Contract, after it has been

⁴ Subsection 1.3(a)(iv) also mentions Riders 6 and 7, both of which are attachments to the Contract (Jt. Ex. 1, Ex. B & C) and thus are part of the record. Both riders involve a customer’s lease of facilities, such as meters, from ComEd, and neither appears applicable only to bundled services.

terminated. Accordingly, if SBC Illinois' first exception is rejected, the Proposed Order's findings regarding mootness should be limited to the period during which the Contract remained in effect. This argument is set forth in SBC Illinois' second exception.

EXCEPTION 2:

THE PROPOSED ORDER INCORRECTLY CONCLUDES THAT SBC ILLINOIS' CLAIMS ARE MOOT.

Although the Proposed Order determines that SBC Illinois was entitled to customer-specific CTCs, it also finds that the Contract has expired and thus that SBC Illinois' claims for relief are moot. See PO at 13. In particular, the "Conclusions" section of the PO finds moot the claims that "the Commission require ComEd to provide customer-specific CTCs for the IBT facilities served under the Contract" and that ComEd begin billing SBC Illinois "according to such customer-specific CTC calculations." Id. at 13-14. Nevertheless, the Proposed Order states that, if the parties had extended the Contract, SBC Illinois "would be entitled to customer-specific CTCs for Contract facilities." PO at 13-14.⁵

There are several problems with these findings. First, there is no record support for the finding that the Contract has expired. Second, the statements in the Proposed Order about the expiration of the Contract are inconsistent with what actually happened. Third, the Proposed Order's assumptions about the effect of the Contract's termination are wrong.

⁵ The Proposed Order also concludes that, even if the parties had extended the Contract, ComEd would not have to bill SBC Illinois according to customer-specific CTCs because the Contract did not allow unbundled services. PO at 14. The conclusion regarding the scope of the Contract is incorrect for the reasons stated in Exception 1. The assumption regarding the parties' extension of the Contract is incorrect for the reasons stated in Exception 2.

The Proposed Order assumes that the Contract remained in effect only through December 31, 2002 (its original term), and thus has expired by its own terms. See PO at 3 & n.10. This finding has no basis in the record, which closed on June 17, 2002 (see Tr. 406), and is in fact contrary to the only record evidence on this issue. Section 1.2 of the Contract contains an “evergreen” provision and provides for the Contract’s automatic renewal for subsequent 12-month periods after its original five-year term, unless one of the parties provides a notice of termination. See Jt. Ex. 1 § 1.2.

Moreover, although the Proposed Order is correct that Contract has expired, its assumption about the reason for that expiration is incorrect. The Contract did not expire by its own terms at the end of 2002. On November 25, 2002, subsequent to the close of the record, ComEd sent a letter to SBC Illinois stating that it was terminating the Contract as of December 31, 2002, pursuant to § 1.2. Accordingly, to the extent that the Commission chooses to discuss the actual termination of the Contract, it should have a record basis for doing so and it should present the facts accurately. See Smith v. Department of Registration & Education, 412 Ill.2d 322, 348 (1952) (stating that administrative order must be based on evidence presented at hearing). For these reasons alone, the Proposed Order’s statements about the expiration of the Contract should be eliminated or revised.

Most importantly, regardless of how the Contract came to an end on December 31, 2002, the Proposed Order’s conclusion that mootness prevents SBC Illinois from making use of customer-specific CTCs is incorrect. In fact, ComEd’s own testimony shows that SBC Illinois is entitled to make use of such CTCs now, as a result of the

Contract's termination and of the effect of that termination on a customer's ability to avail itself of customer-specific CTCs.

In ComEd's view, a customer with an existing contract would have to terminate that contract before it could take advantage of delivery services. See ComEd Ex. 3.0 (Geraghty), pp. 12-13. The CTC applicable to that customer thus would begin to affect its billing only after its contract had ended. Nevertheless, ComEd's testimony in this proceeding makes clear that the CTCs applicable to at least one group of customers – those with customer-specific electric service contracts – are based on their status prior to becoming delivery services customers. ComEd witness Paul Crumrine testified that the company decided to give a customer-specific CTC to any customer served under a customer-specific electric service contract to allow that customer “upon appropriate termination of the contract, . . . to retain during the transition period [to a competitive market for electric service] the benefit of the rate it had negotiated” in its special contract. ComEd Ex. 4.0, p. 6 (emphasis added).⁶ In its response brief, ComEd similarly stated that customers with customer-specific electric service contracts “should be entitled to the continuation of the benefit of the reduced rates in the form of individually calculated transition charges.” ComEd Resp. at 10. In short, according to ComEd, a customer served under a customer-specific electric service contract is entitled to a customer-specific CTC, and it is entitled to make use of that CTC after its contract has been “appropriately terminated.”

There can be no dispute that there was an “appropriate termination” of the Contract here. ComEd's testimony stated that it expected customers with customer-

⁶ In certain proprietary exhibits, ComEd provides more detailed information about the termination of its existing special contracts and the calculation of CTCs for customers having such contracts. See ComEd Ex. 3.0P (Geraghty), pp. 20-21 and Ex. D, pp. CE 1622-23.

specific contracts to honor the termination provisions of those contracts. See ComEd Ex. 3.0 (Geraghty), p. 14. Under the assumptions made by the Proposed Order, SBC Illinois honored those provisions because the Contract expired by its own terms at the end of 2002. In reality, SBC Illinois honored those provisions because ComEd terminated the Contract through notice to SBC Illinois, pursuant to the terms of § 1.2. In any event, based on the Proposed Order's conclusion that SBC Illinois had a customer-specific contract, it was entitled to receive from ComEd customer-specific CTCs for all facilities covered by the Contract, upon the Contract's "appropriate termination." See PO at 8.

As a result, under ComEd's own argument, SBC Illinois is entitled to take advantage of its customer-specific CTCs as of January 1, 2003, if it chooses to become a delivery services customer for any or all of the facilities covered by the Contract.⁷ Accordingly, SBC Illinois' requests that ComEd be required to calculate customer-specific CTCs for these facilities and that ComEd begin billing it according to such CTCs are not moot.

The Proposed Order should be revised to eliminate any suggestion that mootness bars requiring ComEd to calculate customer-specific CTCs for the facilities covered by the Contract and requiring ComEd to begin SBC Illinois according to such CTCs. The Commission should incorporate into its order the replacement language regarding this issue set forth in Attachment 1 to this brief.

⁷ The parties submitted conflicting evidence regarding the number of facilities covered by the Contract as of November 1999. The record is clear, however, that as of May 2002 (when the Commission received testimony in this matter), ComEd had notice that SBC Illinois wanted 126 facilities to be included under the Contract.

EXCEPTION 3:

THE PROPOSED ORDER IMPROPERLY REJECTS SBC ILLINOIS' REQUEST FOR REPARATIONS.

Based on its conclusion that the facilities covered by the Contract could only receive bundled service from ComEd during the life of Contract, the Proposed Order rejects SBC Illinois' claim for reparations. See PO at 13. Even assuming that the Proposed Order correctly concluded that the Contract allowed only bundled services (which is not correct), its rejection of any reparations claim ignores ComEd's obligations, under the Public Utilities Act and its own tariffs, to customers with customer-specific contracts.

Section 16-108(g) of the Public Utilities Act allowed electric utilities to require customers receiving customer-specific CTCs to sign contracts setting forth the transition charges the customers would pay. See 220 ILCS 5/16-108(g). ComEd's Rate CTC accordingly provides that such customers "must enter into a contract with [ComEd] that sets forth the CTCs to be paid and conditions of CTC payments." Jt. Ex. 2, original sheet 137.

Because ComEd refused to provide SBC Illinois with the customer-specific CTCs it was obligated to provide, SBC Illinois never had the opportunity, during the life of the Contract, to enter into the CTC-related agreement contemplated by § 16-108(g) and Rate CTC. It thus is unknown whether that agreement might have replaced the Contract or served as some sort of supplement to it. It is also unknown what sort of monetary effect that agreement might have had on the rates SBC Illinois paid for facilities then covered by the Contract. These unknowns result solely from ComEd's failure to comply with the terms of its own tariffs and the Public Utilities Act.

Moreover, what the Proposed Order calls the “maneuverings of the parties” (PO at 13), are simply the result of ComEd’s November 1999 response to SBC Illinois’ request for customer-specific CTC calculations. As discussed above, ComEd’s response did not even hint that SBC Illinois could have obtained such calculations if it were willing to terminate the Contract at that time. ComEd simply said that SBC Illinois was entitled to a class CTC calculation, which “will apply to each Ameritech account served under the contract.” Jt. Ex. 5. Because ComEd did not take the position that the Contract precluded unbundled services, SBC Illinois did not seek to terminate the Contract in 1999, as it clearly could have under the Proposed Order’s and ComEd’s understanding of the Contract. Any subsequent “maneuverings of the parties” result from the position that ComEd chose to take in 1999.

Nevertheless, the Proposed Order leaves SBC Illinois without a remedy in what it appropriately terms “an ironic situation.” PO at 13. What is particularly ironic, however, is the incentive the Proposed Order provides for ComEd’s future behavior. In particular, ComEd now has the incentive to withhold information and to fail to comply with its tariffs in hopes that customer ignorance and the delays inherent in litigation ultimately will moot a controversy and leave ComEd unpunished for its illegal acts.

The Proposed Order should be revised to allow SBC Illinois to obtain reparations as a result of ComEd’s refusal to provide customer-specific CTCs from November 1999, when they were originally requested, through the remaining term of the Contract. The Commission should incorporate into its order the replacement language regarding this issue set forth in Attachment 1 to this brief.

CONCLUSION

THEREFORE, for all the foregoing reasons, the Commission should adopt the Proposed Replacement Language for the Proposed Order set forth in Attachment 1 to this brief.

Respectfully submitted,

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